IN THE SUPREME COURT OF MISSOURI

ST. CHARLES COUNTY, et al., Appellants,	)	
v.	)	SC 86302
CITY OF ST. PETERS, et al., Respondents.	)	

SECOND SUBSTITUTE BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Treatises

Constitutional Provisions

INTRODUCTION AND SUMMARY OF ARGUMENT

St. Peters' Argument Misstates St. Charles County's Claims

In 1992 St. Peters passed two ordinances creating the St. Peters Centre Redevelopment Area ("SPCRA"). Points I – II are about whether those ordinances properly authorize St. Peters to collect payments in lieu of taxes ("PILOTS") and sales taxes (dubbed economic activity taxes by § 99.845.3 RSMo) ("EATS") from the SPCRA. St. Charles County does not dispute that St. Peters had the authority to create the SPCRA. Thus, St. Peters' attempt to change the issue from St. Peters' authority to collect PILOTS and EATS to the facial validity of the 1992 ordinances is not responsive to Points I-II and is contrary to the causes of action pleaded. That error in St. Peters' argument is compounded because it also leads St. Peters to misunderstand – and therefore, misargue – the application of the statute of limitations in this case. It is not the passage of the ordinance that triggers the statute of limitations. Rather, it is the annual, actual payments to St. Peters by St. Charles that causes St. Charles County to ***sustain*** damage within the meaning of § 516.100, RSMo 2000. St. Peters' argument therefore ignores the clear language of § 516.100 that a "cause of action shall not be deemed to accrue when the wrong is done or the technical breach of contract or duty occurs, but when the damage resulting therefrom is sustained and is capable of ascertainment…."

St. Peters' Argument Tacitly Admits that St. Peters Violated the Law

St. Peters' arguments supporting its collection of PILOTS and EATS from the SPCRA tacitly admits that it violated the law. St. Peters asserts that the entire 580 acres of the SPCRA is a single redevelopment project.[1] Yet PILOTS are legally justified only because they are special assessments. Tax Increment Finance Comm'n of Kansas City v. J.E. Dunn Const. Co., Inc., 781 S.W.2d 70, 76 (Mo. banc 1989). And special assessments may only be collected from real property that receives a direct and substantial benefit from the PILOTS.

St. Peters' own ordinance admits that the Rec-Plex is not intended to provide a benefit to the land specially assessed apart from the benefit received from the entire City of St. Peters.

> **This recreation complex will serve the residents of St. Peters and St. Charles County. In addition, it will be made available to the area schools for classes and team competition. However, this facility will contain facilities which will have a far broader positive impact for the City, the St. Louis area and the [sic] even the United States….**

[1] Indeed, St. Peters now asserts that the Rec-Plex is an "activity" contemplated under the SPCRA redevelopment plan. (Resp. St. Peters' Sub. Br. at 27)("the Rec-Plex is only one of several activities under the plan").

Appellants' App at A-114-115. Its brief makes a similar admission. "The Rec-Plex clearly benefits a geographic area broader than the Area." St. Peters' Br. at 45.

Moreover, St. Peters' Ordinance intends to pay for the Rec-Plex bonds **"from ad valorem taxes which may be levied on all taxable, tangible property within the City, without limitation as to rate or amount."** But the property within the SPCRA will be asked to pay a special, additional lug if the City needs extra funds for the Rec-Plex.

> **It is the City's intent to pay the principal of and interest on the Bonds [for the Rec-Plex], in any year, with money legally available for such purpose in the City's Special Allocation Fund.**

Appellants' App. at A-115. This additional lug, in the form of PILOTS (and EATS), comes from tax money otherwise due St. Charles County and the Fort Zumwalt School District. Such PILOTS cannot be special assessments under St. Peters' own ordinances, because the PILOTS are not limited to "only those parcels of real property and improvements thereon directly and substantially benefited by the proposed redevelopment project improvements." § 99.820.1, RSMo 2000.

Moreover, the Redevelopment Plan admits that "*[N]o redevelopment projects are identified for this core area of the Special District at this time.*" (Emphasis added.) (LF1391). This "core area" comprises more than 400 acres (84%) of vacant land of the 581 acres in the SPCRA. (LF 192)

When St. Peters approved the Costco redevelopment project, it used the words "redevelopment project" in its Ordinance 3340, passed by St. Peters in 2000, nearly 8 years after it began collecting PILOTS and EATS within the Area. (Appellants' App. at A-164, 165)(The Board of Aldermen of the City hereby ratifies and confirms … the implementation of the Redevelopment Project….")(note the singular "Project"). The words "Redevelopment Project" or "Redevelopment Projects" were not used in the 1992 authorizing ordinances. Thus, the Costco project is the first instance in which St. Peters defined a redevelopment project.

If, as St. Peters now argues, the entire SPCRA is a single project, the Costco ordinances with their separate legal description of the Costco project (Appellants' App. at A-203) would not have been necessary to authorize the Costco project. Under St. Peters' argument, Costco becomes a project within a project; the TIF Act makes no provision for a project within a project.

PILOTS May be Used Only for a Private Use

St. Peters' argument in response to Point III (some of which is also found in St. Peters' response to Point I) that the Board of Aldermen may determine a private or public use, depends on St. Peters' attempts to change the word "use" into "benefit," a linguistic gymnastic not supported by either law or in the language of the Tax Increment Financing Act. A special assessment for a street, sidewalk, or sewer that abuts or directly benefits private property has a private use. It directly serves the private property it touches and directly enhances its private

value – a condition that justifies the special assessment. See, Sears v. City of Columbia, 660 S.W.2d 238, 260 (Mo. App. 1983) ("[n]othing is a benefit which doesn't enhance the value of the property"). Special assessments are considered payment for value received -- a quid pro quo for the property paying the assessment. See, City of St. Louis v. Allen, 53 Mo. 44 (1873) (with a special assessment "[i]t is considered that the property receives a benefit from the improvement equivalent to the cost of the work done").

A public use – whether a city hall, a public park, a police station or a recreation facility – is much different from a private use within the meaning of the Tax Increment Financing Act. The Court drew this distinction in Crittenton v. Reed, 932 S.W.2d 430, 435 (Mo. banc 1996) (when a purported special assessment provides no special benefit directly to the property assessed, the amount levied against the property is not a special assessment, but is a tax).

The Constitutional Issues are Questions of First Impression

Without legal answers for the constitutional issues raised, St. Peters, the Attorney General and Costco attempt to brush the questions off. But there has never been a case permitting a diversion of sales taxes (as opposed to ad valorem taxes) to benefit a private company or, for that matter, a city that wishes to siphon revenue due a county or a school district to build its own municipal facilities. St. Charles County should not have to pay for St. Peters' city facilities. These are serious constitutional questions that deserve this Court's serious attention.

These questions are particularly pertinent in light of a growing trend of state supreme court cases that are re-examining the public use doctrine. In those states, courts are cutting back on broad interpretations of public eminent domain and financing arrangements that had allowed cities to provide tax dollars and condemnation powers to aid private corporations pursuing private profit. Abuses of financing devices using tax incentives for private development of real property designed to assist in the eradication of true blight put at risk the ability of cities like Kansas City and St. Louis to use such financing devices where blight is real, not imagined by a city's board of aldermen for the purpose of building municipal buildings. As the Brookings Institution Center on Urban and Metropolitan Policy has reported,

> **"a potentially dynamic tool for reinvestment in Missouri's most disadvantaged communities threatens to become an engine of sprawl as it is abused by high-tax-base suburban areas that do not need public subsidies."**

Thomas Luce, RECLAIMING THE INTENT: TAX INCREMENT FINANCING IN THE KANSAS CITY AND ST. LOUIS METROPOLITAN AREAS, Brookings Institution Center on Urban and Metropolitan Policy, April, 2003 at v.

Finally, the defenses raised by St. Peters – the statute of limitations, laches, waiver and estoppel – were neither properly pleaded nor, if properly pleaded, applicable in this case.

The decision of the trial court should be reversed and summary judgment entered in favor of St. Charles County.

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR ST. PETERS ON COUNTS I – III.

Counts I-III of Appellants' petition address only the 1992 Ordinances.

St. Peters begins its argument with two false premises. First, St. Peters asserts that St. Charles County claims that its ordinances violate § 99.820 and that St. Charles County failed to plead such a violation.. St. Peters' Br. at 33. Counts I-III challenge St. Peters' collection of PILOTS and EATS. Section 99.845, not § 99.820 authorizes the collection of PILOTS and EATS.

St. Charles County's argument relating to § 99.820 does not claim a violation of that section. Rather, the argument explains how the limitation contained in § 99.845 permitting the collection of PILOTS and EATS only from "the area selected for a redevelopment project" is consistent with the limitation in §99.820 that "the area selected for a redevelopment project shall include ***only*** those parcels or real property and improvements thereon substantially benefited by the proposed redevelopment project improvements." (Emphasis added). Thus, § 99.845 permits the collection of PILOTS and EATS only from property that receives a direct and substantial improvement. This is consistent with case law limiting the collection of special assessments from real property that receives a direct and substantial benefit from the improvements for which the assessments

are collected. See, for example, Sears v. City of Columbia, 660 S.W.2d 238, 260 (Mo. App. W.D. 1983) and City of Springfield v. Bradley, 744 S.W.2d 559, 560 (Mo. App. S.D. 1988). Thus, the claim of violation of § 99.845 is the proper claim to challenge the collection of PILOTS and EATS; that violation is clearly pleaded in the petition.

Second, St. Charles County does not challenge the facial validity of the 1992 ordinances in Counts I-III as St. Peters contends. St. Peters' argument that ordinances are presumed valid is, therefore, a carefully planned diversion. St. Peters Br. at 34. The issue is whether the ordinances in question, which are valid for creating a redevelopment ***area***, are a legally valid predicate for collecting PILOTS and EATS. They are not. As Dunn states, PILOTS are specific to improved property: "PILOTS are special assessments levied against the property in the District for the improvements provided ***that property*** under a redevelopment plan." Id. 781 S.W.2d at 77 (emphasis added). PILOTS and EATS were collected from all of the 580 acres in the SPCRA, despite the fact that most of ***that*** property received no improvements from which PILOTS and EATS could be collected under the 1992 ordinances.

Next, St. Peters challenges the validity of the County Assessor's affidavit. It failed to do so at the hearing before the trial court and, therefore, waived any evidentiary claim that it now invents. St. Peters' reliance on Missouri Ins. Guar. Assoc. v. Wal-Mart, 811 S.W.2d 28, 34 (Mo. App. E.D. 1991) and Cardinal Glennon Children's Hosp. v. St. Louis Labor Health Inst., 891 S.W.2d 560, 561

(Mo. App. 1995) is misplaced. Both of those cases denied vitality to affidavits submitted for the purpose of creating genuine issues of material fact in an effort to defeat summary judgment. Here, the assessor's affidavit was submitted not to create a disputed fact, but to support St. Charles County's motion for summary judgment. The affidavit was uncontroverted by St. Peters at the summary judgment proceedings and unobjected to by St. Peters. St. Peters bore the obligation to controvert the affidavit or live with the consequences of that failure. See, ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 376, 383 (Mo. banc 1993)(review of summary judgment is de novo because it is based on trial court's record and the law; "if the non-movant cannot contradict the showing of the movant, judgment is properly entered against the non-movant"). Because it was not controverted, the assessor's affidavit stands as an undisputed, material fact in the record upon which this Court may properly base its summary judgment decision in favor of St. Charles County.

The assessor's affidavit shows beyond serious dispute that there has been no enhanced value to the property in the entire SPCRA because St. Peters built itself an ice rink and a swimming pool at one end of the 580 acre SPCRA. Yet even were this Court to ignore the assessor's affidavit, it remains an undisputed fact that the City of St. Peters owns the Rec-Plex; that the Rec-Plex pays no ad valorem taxes and no PILOTS; and that St. Peters has collected PILOTS and EATS from property that has received no improvements. There can be no collection of PILOTS, which are special assessments, from ***that*** property, Dunn,

because the Rec-Plex pays no PILOTS. Further, there can be no legal special assessments against the remaining property in the SPCRA because that property does not receive a direct and substantial benefit. Sears v. City of Columbia, 660 S.W.2d 238, 260 (Mo. App. W.D. 1983) and City of Springfield v. Bradley, 744 S.W.2d 559, 560 (Mo. App. S.D. 1988). Once property that does not receive a direct and substantial benefit is included in a special assessment, the special assessment loses its character as a special assessment and becomes a general tax. Crittenton v. Reed, 932 S.W.2d 430, 435 (Mo. banc 1996) (when a purported special assessment provides no special benefit to the property assessed, the amount levied against the property is not a special assessment, but is a tax). Tellingly, St. Peters fails even to address Reed in its brief.

Whether a fee levied against real property based on ad valorem tax rates is a special assessment or a tax thus depends on whether the funds "***pay for improvements clearly conferring special benefits upon the property assessed***." City of Springfield v. Bradley, 744 S.W.2d 559, 560 (Mo. App. S.D. 1988) (emphasis added).

St. Peters argues that such special benefits exist because "spin-off" economic benefit from the construction of the Rec-Plex is sufficient to uphold special assessments in the entire SPCRA to fund the construction and operation of the Rec-Plex. (St. Peters' Br. at 45). By definition, "spin-off economic benefit" is indirect economic benefit. It may be true that a convention center or an airport

produce spin-off benefits for an entire community; it does not follow, however, that a special assessment may be used to fund the convention center or airport.

The rule is that "if the benefit is too speculative and will only occur at too remote or lengthy period of time from the project, then no assessment can be presently made." Sears 660 S.W.2d at 254. Benefits that are "spin-off" benefits, benefits that are the result of anticipated general economic activity, are not the type of benefits that can support assessments that must be based on "the property receiving a benefit from the improvement equivalent to the cost of the work done." City of St. Louis v. Allen, 53 Mo. 44 (1873). Instead, as Crittenton holds, a general tax is the method for paying for spin-off producing improvements.

For the Board of Aldermen to base its claim to special assessments on such speculation was arbitrary, capricious and an abuse of discretion.

The benefit necessary to support a special assessment has been clearly defined by Missouri courts. (1) It must be clear, direct and substantial. Bradley; City of Webster Groves v. Taylor, 13 S.W.2d 646, 647 (Mo. App. 1988). (2) It must create an increase in assessed valuation for the property assessed. Sears v. City of Columbia, 660 S.W.2d 238, 260 (Mo. App. W.D. 1983).

At trial, counsel for St. Peters admitted that some property has not received a benefit from the PILOTS collected to pay for the City's Rec-Plex. "Maybe you can point to a parcel and say that parcel's value hasn't gone up because of this, but the whole area is benefiting from the infrastructure improvements…. We don't

need to show that there is a direct benefit to each individual parcel right now." (Tr. 106.)

The undisputed evidence before the trial court on the question whether the land in the SPCRA received an increase in its assessed valuation different from the increase in assessed valuation from land generally in St. Peters is the affidavit of the Assessor. Mr. Zimmerman concluded that

> increases in assessed valuation of real property located in the St. Peters Centre Redevelopment Area are similar to increases in the assessed valuation in comparable areas of St. Charles County that are outside the Redevelopment Area. If properties within the Redevelopment area have increased in assessed valuation at a higher rate, those higher increases are due to improvements made to the properties in question.

(LF1435).

St. Peters' argument that the valuation in the SPCRA has increased does not offer any comparison of property outside the area—a critical absence if the question is, as here, whether there has been a benefit to property within the area not experienced by property outside the area.

Further, St. Peters' argument that "over $1 million in street improvements have been completed within the Area"[2] and "[o]ver $8.6 million for costs incurred in redevelopment in the area traversed by Spencer Creek…." (St. Peters. Br. at 38)

carefully omits evidence that none of the PILOTS and EATS collected prior to the construction of the separate Costco Project funded those improvements.

On November 15, 2000, St. Peters reported to the Missouri Department of Economic Development the following expenditures:

Expenditures For Total Project Costs Funded by TIF:

	Total Since Inception	Report Period Only
(a) Public Infrastructure (streets, utilities, etc.)	$0	$0
(b) Site development (grading, dirt moving, etc.)	$0	$0
(c) Rehab of existing buildings	$0	$0
(d) Acquisition of land and buildings	$0	$0
(e) Other (specify): Rec Plex (LF 787)	$14,447,763.25	$0

In its 1999 report, however, St. Peters reported that it had spent $0 for "project costs" funded by the TIF in the SPCRA. (LF 782).

The substantial benefit to property within the SPCRA anticipated by the St. Peters Board of Aldermen was not limited to the SPCRA. By its own

[2] Notice the slip – St. Peters admits here that it is not a project, but an ***area***.

admission the Rec-Plex will "have a broader positive impact for the City, the St. Louis area and even the United States."

The land in the SPCRA cannot be assessed to pay for benefits that are designed to extend outside the area itself. When that happens, what is collected is not a special assessment, but a tax. Crittenton. Because PILOTS can be special assessments only, St. Peter violated §§ 99.805 and 99.845 in collecting taxes in the guise of PILOTS and EATS from the SPCRA to fund the Rec-Plex.

The remainder of St. Peters' response to Point I (St. Peters' Br. at 42, Point I, E.) depends on the Court concluding that the 580 acres in the SPCRA is a single redevelopment project, of which the Rec-Plex is a part. To agree with St. Peters' argument, this Court must conclude that:

- a "redevelopment area" as defined in § 99.805(9), RSMo 1991 is an identical legal term with the same meaning as a "redevelopment project," which is separately defined in § 99.805(10). (The trial court ignored the independent legal significance these terms hold as a result of the legislature's distinct statutory definitions and use of the terms in the TIF Act.)
- PILOTS and EATS could be collected from the entire 581 acres of the ***redevelopment area*** even though the legislature permits the collection of PILOTS and EATS from the area selected for a ***redevelopment project***, §§ 99.845.1, 3. The power to collect PILOTS is justified in Tax Increment Finance Comm'n of Kansas City v. J.E. Dunn Const. Co., Inc., 781 S.W.2d

70, 76 (Mo. banc 1989) because Mo. Const. Article X, § 7 grants the General Assembly "the authority to redirect revenues *attributable to improvements*…." (Emphasis added). By failing to define a project, St. Peters attempted to collect revenues that were not attributable to improvements. This is because the Rec-Plex produces no revenues in that it pays no ad valorem taxes.

- The failure to define "the area selected for a redevelopment project" in its 1992 ordinances and the failure to notify other taxing districts of its intent to collect PILOTS and EATS from the entire area by using those statutory words is without legal significance. The designation of a project informs those districts and taxpayers of the specific area from which PILOTS and EATS are to be collected. The 1992 ordinances did no more than suggest that three separate projects were "envisioned" and that "future redevelopment projects" would also possibly occur. (Appellants' App. A-114-117).
- PILOTS, as special assessments, could be collected from the entire area despite the fact that no clear special benefit accrued to property within the area as a result of the expenditure of PILOTS and EATS for the construction of the Rec-Plex. In Missouri, special assessments are special creations of the law that may only be collected from areas that receive a direct and substantial benefit from the assessment collected.

St. Peters' argument can be reduced to a simple proposition – that its failure to use the word "project" in its Ordinances 1961 and 1962 (LF1343; 1353) and its description of three "envisioned," separate projects in its Redevelopment Plan (LF1391) are of no legal consequence. St. Peters tells the Court now – even though it never said so in any ordinance or legal paper until this action was filed – that it really intended the entire 581 acres to be a single redevelopment project. St. Peters says that the words "TIF District Description" used in the Redevelopment Plan really means "area selected for a redevelopment project." And it says so as if the words actually used – or those rejected—really do not matter at all.

For legal documents that purport to determine rights and duties, words matter. The words demanded by the statute serve multiple functions, not the least of which is they either give – or in this case fail to give – notice of what a city intends.

That words are important is particularly so here because grants of power to municipalities are strictly construed. The law is clear: A municipality may do no more than it is expressly authorized to do by the legislature. Burks v. City of Licking, 980 S.W.2d 109, 111 (Mo. App. S.D. 1998).

First, by defining a "redevelopment area" and a "redevelopment project" as separate terms, the legislature intended that these designations have independent legal significance. See, State ex rel SSM Health Care of St. Louis v. Neill, 78 S.W.3d 140, 144 (Mo. banc 2002)("[w]hen interpreting a statute, however, this

Court is required to give meaning to every word of the legislative enactment" citing Spradlin v. City of Fulton, 982 S.W.2d 255, 262 (Mo. banc 1998)). Unless this Court is willing to conclude that "project" and "area" mean the same thing – rendering the separate definitions a redundancy in the TIF Act – St. Peters' argument is incorrect.

Second, the Act permits collection of PILOTS and EATS only from the "taxable real property in such redevelopment project." § 99.845.1 and § 99.845.3 (permitting the collection of EATS only in the "area of the redevelopment project"). As Counts I-III make plain, the graveman of St. Charles County's claim is that St. Peters had no authority to collect PILOTS and EATS from the entire SPCRA under the 1992 ordinances. (LF 17) The TIF Act allows the collection of PILOTS and EATS only from a project. If St. Peters wanted to collect the PILOTS and EATS, it had to use the statutory language to do that. See LF 1321, the Kansas City ordinance at issue in Dunn. (In Dunn, the redevelopment area and the area of the redevelopment project were coterminous. The Kansas City Ordinance provided a legal description and stated: "[legal description] is hereby designated as the **project area** for the 10th and Troost Tax Increment Financing plan." This is the proper language which allows collection of PILOTS).

The limitation imposed by § 99.805(10)'s definition of "redevelopment project" serves two additional purposes: First, proper designation provides notice to those persons who might be subject to the special assessment of their exposure to additional government fiats. Second, the limitation assures the other taxing

districts that PILOTS and EATS will be collected only from those areas that will be directly improved by the project – thus resulting ultimately in increased tax revenues to those government entities from the completed project.

By failing to use the word "project" in defining the area, St. Peters failed to provide notice of the specific land from which PILOTS and EATS would be collected. And by collecting PILOTS and EATS from areas that received no direct and substantial benefit from the construction of the Rec-Plex, St. Peters diverted tax revenues from St. Charles County and other taxing districts, including school districts, to pay for the Rec-Plex, without providing a corresponding benefit to the property as a result the property's payments of PILOTS or to the taxing authorities as a result of increased assessed valuation created by the TIF funds.

Reasoning itself into a dizzying circle, St. Peters argues that because it collected PILOTS and EATS from the entire 581 acre area, the entire redevelopment area was also a project – or else St. Peters couldn't have collected the taxes. But this cannot change the core legal fault in St. Peters' argument: St. Peters failed to use the words required by the statute as a predicate for collecting PILOTS and EATS. Without the limitation imposed by the statutory words, St. Peters cannot collect PILOTS and EATS from the entire SPCRA.

Again, the issue here is the authority of St. Peters to collect PILOTS and EATS. Section 99.845.1 & .3 require the limitation St. Peters ignores – that PILOTS and EATS cannot be collected except from "the area selected for a

redevelopment project." This limitation prevents what St. Peters did in this case; it also is the necessary legal predicate to the collection of PILOTS and EATS.

Appellants' brief sets out a word-to-word comparison of the statute and the ordinances; that display shows that St. Peters failed to follow the directives of the statute. St. Peters cannot now claim that it meant something it did not say, particularly when the statute made the use of that language mandatory.

St. Peters argues that it could finance the Rec-Plex with PILOTS because § 99.805(11)(f) defines redevelopment project costs to include "expenditures for the costs of construction of public works or improvements." St. Peters argues that the Rec-Plex is a public work or improvement.

It is a fundamental tenet of statutory construction that all parts of a statute must be harmonized where possible. 20th & Main Redevelopment Partnership v. Kelley, 774 S.W.2d 139, 141 (Mo. banc 1989). As is discussed in Point IV in Appellants' Brief, § 99.805(7) limits the use of PILOTS to "a private use." The construction of a public facility is not a private use, nor does it bestow a substantial and direct benefit to private property by enhancing its value.

> [S]pecial assessments can be sustained only upon the theory that the property assessed receives some special benefit from the improvement differing from the benefit that the general public enjoys….
>
> Special benefits are those which the property assessed receives, due to the improvements, in excess of the general public

benefit. Remote or contingent benefits enjoyed by the general public will not sustain such assessment.

The evaluation of the benefit to the parcel need not look only to how the land is presently being used. If the improvement generally enhances the value of the property, the special assessment may be made.

14 McQuillin, MUNICIPAL CORPORATIONS § 38.32, p. 151 (3rd ed. rev'd. 1998). Accord, City of Springfield v. Bradley, 744 S.W.2d 559, 560 (Mo. App. 1988), City of Webster Groves v. Taylor, 321 Mo. 955, 959, 13 S.W.2d 646, 647 (1929) ("special or local assessments are valid only when they are imposed to pay for improvements clearly conferring special benefits upon the property assessed, and the benefits must be substantial, certain and capable of being realized within a reasonable time"). Thus, to harmonize the statute sections, only public works that provide a direct and substantial benefit to private property through enhanced value may be funded with PILOTS.

Section 99.825.2 RSMo. 2000 defines a class of projects that qualify as public improvements. They are "infrastructure projects" such as streets and sidewalks, not city recreational buildings. These are proper "redevelopment project costs" because they create a direct increase in value to the property they improve commensurate with the costs of the improvement.

As argued in Appellants' opening brief, the Rec-Plex is a public facility designed to provide recreation for the entire city, not enhance the value of specific

properties burdened with the payment of PILOTS and EATS. This interpretation is consistent with the clear, express limitation placed on the use of PILOTS in § 99.805(7) that PILOTS "are to be used for a private purpose…."

This also explains the careful choice of words found in § 99.820.1(6) There a municipality is authorized to "acquire and construct public facilities within a redevelopment area." (Emphasis added). This is authority to do an act; it is not authority to collect or expend PILOTS. Section 99.820.1(6) does not make a recreation facility into an authorized redevelopment project nor does it permit expenditures of PILOTS and EATS for such facilities.

Absent such express authority in § 99.845.1 for a city to expend PILOTS and EATS for "redevelopment project costs" that include public works and improvements, the TIF Act must be read to limit construction with PILOTS to private projects only.

Conclusion

The trial court erred in ordering summary judgment in favor of St. Peters and denying summary judgment to Appellants on Counts I - III.

II. NOTHING IN THE 1992 AMENDMENTS PERMITS THE CITY TO COLLECT PILOTS AND EATS FROM A REDEVELOPMENT AREA.

St. Peters next responds that the TIF Act permits collection of PILOTS and EATS from a redevelopment area, arguing that 1992 amendments to the TIF Act make it possible to have multiple projects within a redevelopment area. St. Peters asserts that the TIF Act permits but does not require a municipality to have multiple redevelopment projects within a redevelopment area.

Appellants agree with this proposition. For purposes of deciding this case, however, the proposition is without legal significance. This is because nothing in the 1991 amendments permits a city to collect PILOTS and EATS from an area – only from "the area selected for the redevelopment project." §§ 99.845.1 & .3.

The 1992 amendments followed the decision in Dunn. Dunn involved a 57,500 square foot parcel that was both a redevelopment area and redevelopment project. After the Supreme Court approved the concept of TIF financing because PILOTS were special assessments, the legislature realized that large areas of cities could be blighted and permitted the designation of a broad "redevelopment area" in which there would be several projects as private developers could be found. This amendment did away with the need to designate a redevelopment area each time and permitted different projects to be authorized and PILOTS and EATS collected for separately-designated projects within the redevelopment area. See, §

99.810(1) ("the redevelopment area ***on the whole*** is a blighted area") and § 99.801(3) (permitting the "adoption of the ordinance approving a redevelopment project ***within*** a redevelopment area")(emphasis added). The designation of a broad redevelopment area as blighted permits multiple projects within the area – its does not permit the collection of taxes from the entire area.

Far from permitting a city to collect PILOTS and EATS from an entire redevelopment area, however, the 1992 amendments continued to permit the collection of PILOTS and EATS only from "the area selected for a redevelopment project." § 99.845. This language also assured that the character of PILOTS as special assessment was not lost. PILOTS could only be collected from the real property directly and substantially benefited by the assessments. § 99.820. See, Reed, 932 S.W.2d at 435 (where a purported special assessment provides no special benefit to the property assessed, the amount levied against the property is not a special assessment, but is a tax).

St. Peters' brief cites amendments to the TIF Act, carefully ignoring the presence of the word "project" in the statutes it cites. Far from supporting St. Peters' argument, these statutes support Appellants' arguments. For example, the 1991 change in the definition of PILOTS from "estimated revenues from real property in a redevelopment project area" to "those estimated revenues from real property in the area selected for a redevelopment project" merely highlights the fact that the PILOTS can only be collected from a project clearly designated – "selected" – as a project within the area.

Nothing in the statutes supports St. Peters' argument that a redevelopment area never designated as a specific redevelopment project can collect PILOTS and EATS from the entire area.

St. Peters argues that the aldermanic determination that the redevelopment area includes only real property that will be substantially and directly benefited by the collection of PILOTS and EATS is conclusive. This, too, is a tautology; this legislative designation is not conclusive. It is, instead, an admission that the Board of Aldermen failed to follow the statute. The Board failed to define the project from which PILOTS and EATS could properly be collected. Having failed to do so, they have collected PILOTS and EATS in violation the TIF Act from the inception of the SPCRA.

Further, in arguing that all property in the entire area received a substantial and direct benefit from the collection of PILOTS and EATS, St. Peters fails to explain away the creation of the Costco project.

First, the creation of the Costco project as a separate project is an admission that the area designated in the ordinances as an area was not a project. That Redevelopment Plan defined a redevelopment area that would, eventually, contain "three redevelopment projects." (LF 554) (Appellants' Appendix at A-114). Costco is one of those projects. The area is not a project under the plain language of the Redevelopment Plan, its authorizing ordinance or the statute.

Second, St. Peters does not and cannot cite any statutory authority permitting it to create a *project within a project*. And yet, if its argument that the SPCRA is a project is to be believed, then Costco is a project within a project. The TIF Act makes no provision for a project within a project. Under St. Peters' argument the "clock" necessarily began to run in 1992 for the Costco project, not in 2000, because St. Peters created its redevelopment project when it passed the 1992 ordinances. St. Peters cannot have it both ways.

Conclusion

The trial court erred in ordering summary judgment in favor of St. Peters and denying summary judgment to Appellants on Points I - III.

III. SECTION 99.805(7) ONLY PERMITS PILOTS IN PRIVATE USES; THE REC PLEX IS NOT A PRIVATE USE BECAUSE IT DOES NOT BENEFIT PRIVATE PROPERTY OR PAY AD VALOREM TAXES.

Section 99.805(7), RSMo 1991 limits the use of PILOTS to "a private use." This limitation is wholly consistent with the characterization of PILOTS as special assessments. Any other interpretation is inconsistent with a special assessment.

Special assessments are not taxes and are permitted because they are a quid pro quo. They are

> an assessment for improvements, and are not considered as a burden, but as an equivalent or compensation for the enhanced value which the property derived from the improvement. Sheehan v. The Good Samaritan Hospital, 50 Mo. 155. … ***[I]t is considered, that the property receives a benefit from the improvement equivalent to the cost of the work done.***

City of St. Louis v. Allen, 53 Mo. 44 (1873)(emphasis added).

St. Peters argues that giving the statute its plain, ordinary meaning would not permit the use of TIF funds to build roads, sewers, sidewalks. This argument simply ignores the statutory purpose and the special assessment character of PILOTS.

Private use necessarily means direct and substantial private benefit. Where private property abuts new roads, curbing, sidewalks or other similar works or public improvements, there is a direct benefit to private property realized in enhanced value to the property. However, the construction of a public work, such as a sewer, does not create a direct and substantial private benefit unless the property assessed is actually connected to the sewer. See, Bradley, 774 S.W.2d at 562 (where land is not connected to sewer, it received no direct benefit and could not be assessed) and Reed, at 932 S.W.2d at 406 (special assessment proper where private property receives "special benefit from the improvements" and "the amount assessed [is] based on the cost of improvements"). These are private uses; they directly and substantially benefit the private property that finances the improvements. This creates the necessary "equivalent or compensation for the enhanced value which the property derived from the improvement." Sheehan.

It is for this reason that §99.845.1(2) decrees that:

> Payments in lieu of taxes which are due and owing shall constitute a lien against the real estate of the redevelopment project from which they are derived.

Id. The redevelopment project must be a private use because only a private use will create the PILOTS without which tax increment financing cannot work.

St. Peters' brief finds "undeniable" private benefit as a result of enhanced property values in the Area. (St. Peters Br. at 63). But this argument ignores the requirement of Sheehan that the special assessment have a quid pro quo character.

Assessor Zimmerman's affidavit shows that the Rec-Plex did nothing special for property values in the Area. The property values in the Area grew at the same rate as property outside the area. (LF1435). St. Peters also insists that the Rec-Plex "rejuvenated economic activity within the Area." (St. Peters Br. at 63). To the extent that this benefit exists at all, it was not specific to the land within the SPCRA that has been forced to pay a special lug for the Rec-Plex. This benefit is neither sufficiently direct nor substantial to justify payment of special assessments from some land for the benefit of property owners outside the SPCRA. There is none of the essential equivalence that supports special assessments.

The Rec-Plex is not a private use. It provides no benefit to private property. It produces no PILOTS because it pays no ad valorem taxes. It is a municipal building with a public use. It provides no enhancement to the private property from which the assessments are taken.

The legislature meant what it said. If no direct and substantial benefit flows to private property from the improvements made, there can be no collection of PILOTS.

Conclusion

The trial court erred in granting St. Peters' Motion for Summary Judgment and in denying Appellants' Motion for Summary Judgment on Count IV.

IV. ST. PETERS' DECISION TO CREATE THE SPCRA WAS ARBITRARY, MADE IN BAD FAITH AND WAS CONTRARY TO THE LAW.

The trial court erred in granting summary judgment for St. Peters because the St. Peters Board of Alderman acted arbitrarily, in bad faith and contrary to the law in that:

- The Board of Aldermen adopted ordinances that failed to designate a project, the purpose of which was to mislead those reading the ordinance into believing that EATS and PILOTS would not be collected from the Area until a proper project was designated that would pay PILOTS and EATS.
- The Board of Aldermen adopted ordinances that required the City of St. Peters to eliminate or reduce conditions of blight. The Redevelopment Plan listed the conditions that led to the Board's determination of blight and indicated that the TIF would provide immediate relief. St. Peters spent $0 reducing or eliminating the conditions of blight that formed the legal justification for the creation of the SPCRA until it adopted a project – the Costco project. Instead, St. Peters expended all EATS and PILOTS it collected on the Rec-Plex.

- Not until St. Peters approved the separate Costco project, were TIF funds used to improve private property within the area selected for a redevelopment project – and then the funds were segregated so that St. Peters could continue to collect PILOTS and EATS from that part of the Area not within the Costco project area so as to continue to permit the City to fund the Rec-Plex.

- Section 99.820.1, requires that "the area selected for the redevelopment project shall include *only those parcels of real property and improvements thereon* ***substantially*** *benefited by the proposed redevelopment improvements*…." ((Emphasis added).[3] The Redevelopment Plan admits that *"[N]o redevelopment projects are identified for this core area of the Special District at this time.*" (Emphasis added.) (LF1391). This "core area" comprises more than 400 acres (84%) of vacant land of the 581 acres in the SPCRA. (LF 192) A decision to define the "project"/area to include this much land that will not receive a substantial benefit from the "project" shows that the designation of the "project"/area was arbitrary, in bad faith, and in violation of the law.

Again carefully choosing its words, St. Peters claims that improvements in the SPCRA occurred and are scheduled to occur during the life of the Area. St.

[3] Section 99.820.1, RSMo Cum. Supp. 1998 reads "directly and substantially," clarifying the legislature's intent with regard to this limitation.

Peters does not say, because it cannot say it, that PILOTS and EATS were used for any purpose other than the Rec-Plex until the adoption of the Costco project. It is for this reason that the Board did not designate a project when it adopted the SPCRA, but collected PILOTS and EATS anyway. St. Peters knew that if the project were limited to the Rec-Plex – a project that could pay no PILOTS and generate only insignificant EATS – it would not have funds to pay for the Rec-Plex bonds if its other revenue sources (ad valorem taxes and St.Peters general revenue) were not sufficient to meet the bond payments. It was at least arbitrary and in bad faith for St. Peters to collect PILOTS and EATS from the entire Area with the purpose of providing no benefits to the private property that paid the assessment or generated the sales taxes – all so that it could have its Rec-Plex.

Conclusion

For the reasons expressed in Appellants' Point IV, the trial court erred in granting St. Peters' Motion for Summary Judgment on Count V and denying Appellants' Motion for Summary Judgment.

V. ST PETERS HAD NO CONSTITUTIONAL AUTHORITY TO ISSUE REVENUE BONDS.

Mo. Const. art VI, § 27(b) is a limit on the authority of political subdivisions. It permits the issuance of revenue bonds without a vote of the people for certain express purposes, with the retirement of the bonds to occur in a specific way.

St. Peters' brief admits it issued financial obligations to finance the Costco project, but argues that Article VI, § 27(b) does not apply to the bonds it issued. The § 27(b) challenge Appellants bring focuses on the absence of legal authority in the St. Peters' Board of Aldermen to approve revenue bonds funded in whole or in part from non-lease revenue. Said another way, St. Peters had no authority to issue bonds solely by a vote of its Aldermen, except bonds used for the purposes permitted in Article VI, § 27(b).

To the extent that the TIF Act permits St. Peters to issue revenue bonds without a vote of the people for commercial purposes, the principle and interest on such bonds must be retired "solely" with revenue from the lease. That is all the constitution allows. St. Peters' bonds do not meet this core, constitutional criteria, because, as St. Peters admits, it receives no lease revenue from the Costco project.

St. Peters had no constitutional authority to issue revenue bonds for the Costco project unless those bonds were to be "payable solely from the revenues derived … from the lease or other disposal of the facility."

In arguing that § 27(b) does not apply, St. Peters cites no direct constitutional authority for the issuance of the revenue bonds it issued here, or for its ability to incur debt for a private corporation's use.

Unless the bonds issued are authorized by Article VI, §§ 27, 27(a) or 27(b), St. Peters had no legal authority to issue the bonds. Costco's brief fares no better; it, too, fails to cite any constitutional authority for the bonds issued here, claiming only that the obligations are not revenue bonds, without any factual support for that claim. St. Peters' brief admits that it "issued obligations to repay some of Costco's costs of redeveloping part of the blighted area." (Resp. Br. at 78).

Having admitted that it does not meet the qualifications of § 27(b), St. Peters also admits that it had no authority to issue the Costco bonds.

Respondents' Article VI, § 21 argument is no help. Section 21 provides:

> Laws may be enacted, and any city or county operating under a constitutional charter may enact ordinances, providing for the clearance, replanning, reconstruction, redevelopment and rehabilitation of blighted, substandard or insanitary areas, and for recreational and other facilities incidental or appurtenant thereto, and for taking or permitting the taking, by eminent domain, of property for such purposes, and when so taken the fee simple title to the property shall vest in the owner, who may sell or otherwise dispose of the property subject to such restrictions as may be deemed in the public interest.

There is no authority in § 21 for a city to create indebtedness in any form to address issues of blight. Under Respondents' argument, § 21 would permit a city charter to authorize it to issue revenue bonds, even where there is neither constitutional nor statutory authority for it to do so.

Borrowing money on behalf of the public is an activity of which the constitution is properly wary. The state government must operate without a deficit. When the state wants to borrow money to build highways or improve buildings, a constitutional amendment is required.

Cities have no greater authority than does state government. The constitution permits cities to authorize bonds only under the three circumstances set out in §§ 27, 27(a), and 27(b). Where the constitution speaks to an issue, the legislature may not authorize an action that is contrary to the constitutional limitation adopted. Kansas City v. Fishman, 241 S.W.2d 377, 379 (Mo. 1951).

Respondents' reliance on Dunn, 781 S.W.2d 789, is misplaced. In Dunn, § 27(b) did apply because Kansas City purchased the property for itself for commercial purposes. Dunn noted that Article VI, § 27(b) ***of the constitution*** permits "[a]ny ... city ... by a majority vote of the governing body thereof ..." to issue and sell revenue bonds to pay, inter alia, the costs of acquiring real estate for commercial and warehouse purposes." Id. at 800. St. Peters has admitted that it did not purchase or ever own the property. Dunn does not save Respondents.

Respondents' argument -- that §27(b) does not apply to it because it did not acquire real estate for Costco -- is curious. There remains no constitutional

authority in St. Peters to issue the financial obligations it issued here. The grant of power for cities to incur debt is limited; St. Peters' bonds exist outside that authority. The bonds are constitutionally ultra vires.

Conclusion

The trial court should be reversed and judgment entered for Appellants on Appellants' challenge to the legal authority of the city to issue these revenue bonds.

VI. SECTION 99.845.3 VIOLATES ARTICLE VI, §§ 23 and 25

Section 99.845.3 violates Article VI, §§ 23 and 25 because it permits a city to divert taxes, not special assessments, to aid a private corporation.

Each of the cases cited by the respondents is a case involving the diversion of ad valorem taxes, not sales taxes. No case has addressed the issue whether the express permission granted in the constitution to divert ad valorem taxes to remedy blight applies to a diversion of sales taxes for the same purpose. Dunn affirmed the use of PILOTS because they were not taxes, but were special assessments.

The public purpose to which the cases speak is linked to diversion of ad valorem taxes. But a fundamental distinction must be made in analyzing this claim: This case involves economic activities taxes ("EATS"), not PILOTS (payments in lieu of taxes relating to real property). EATS are not abatements of taxes designated as special assessments against real property; they are sales taxes collected in a tax increment financing ("TIF") district. See § 99.805(4).

By breaking the link between ad valorem taxes and remedying blight, the limitations necessarily inherent in that linkage are destroyed. Under Respondents' arguments, cities can spend their tax money for any purpose they choose, so long as they can claim, as here, that some positive economic spin-off will result. This takes "public purpose" too far. As St. Peters' brief admits "St. Peters issued

obligations to repay some of Costco's costs of redeveloping part of the blighted areas." (St. Peters' Br. at 78).

This is the use of tax money to aid a private purpose, an act the constitution expressly condemns.

That EATS are taxes is made clear by the very name the legislature chose – "economic activity taxes"; by language in County of Jefferson v. Quiktrip, 912 S.W.2d 487 (Mo. banc 1995) describing EATS as taxes, and by the leading legal commentator on the subject, see, R. KING, *The Continuing Battle to Curb Blight and the Use of Economic Activity Taxes*, 51 J.MO.BAR 332, 333 (1995) ("[e]conomic activity taxes … appear to be taxes from the time they are collected until they are disbursed.")

Dunn makes clear that as to ad valorem taxes, the TIF law is constitutionally justified because express constitutional permission exists for its use of ad valorem taxes. "By its clear terms, the Constitution permits the General Assembly to provide partial tax relief; included within that power is the authority to redirect revenues attributable to improvements *for the purposes enumerated in art. X, § 7*." Dunn, 781 S.W.2d at 76 (emphasis added).

There is no constitutional provision permitting the use of sales tax revenue to assist private corporations or individuals. Where the constitution speaks to an issue, the legislature may not authorize an action that is contrary to that constitutional limitation. Kansas City v. Fishman, 241 S.W.2d 377, 379 (Mo. 1951). Thus, the broad constitutional prohibition applies to EATS. For the

reasons discussed in Appellants' opening brief, Dunn does not require a different result.

Berry v. State, 908 S.W.2d 682 (Mo. banc 1995) remains a linchpin of the Respondents' arguments. Berry addressed the constitutionality of a legislative decision to alter the allocation of county-wide, general purpose sales taxes payable to all municipalities within a county. Berry addressed a Hancock Amendment challenge. Berry held that "changing the distribution of revenue is not the 'levying' of a new tax requiring voter approval" and was thus not a violation of art. X, § 22.

St. Peters also suggests that Berry stands for the proposition that "Art. VI, § 23 does not apply to shifts in revenue among public bodies." Id., at 685. The full quote from Berry is "Article VI, § 23 clearly prohibits giving public money to *private* entities. [citation omitted]. Art. VI, § 23 does not apply to shifts in revenue among public bodies." Id., at 685.

St. Charles County's claim here is that through the TIF Act, St. Peters has given money to a private entity. Berry aids St. Charles County, not St. Peters and its fellow respondents.

Finally, Respondents assert that providing a platform for a private company to make profits using public funds is a public purpose, not a private one. That conclusion is seriously in doubt given the growing trend to limit the public use exception to truly public uses -- not the aid of private developers seeking private profit. See, County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004)(Court

overruled longstanding precedent to hold that the use of eminent domain for land acquisition for a private developer violated the Michigan constitution); Georgia Department of Transportation v. Jasper County, 586 S.E.2d 853 (S.C. 2003)(no public use in creating a maritime terminal where a private lessor did all development work, operated the terminal and received profits from the operations); Southwestern Illinois Development Auth. v. National City Environmental LLC, N.E.2d 1 768 (Ill. 2002)(racetrack not a public use because does not result in a public use, but in private profits).

Further, the debate about whether, and when, economic development projects constitute a public use will be taken up by the United States Supreme Court this term in the context of condemnation of property for an economic development project. In Kelo v. City of New London, 843 A.2d 500 (Conn. Mar 09, 2004), the Connecticut Supreme Court held, in part, that economic development projects created and implemented pursuant to Connecticut law that allowed the exercise of eminent domain in furtherance of public economic benefits of creating new jobs, increasing tax and other revenues, and contributing to urban revitalization, satisfied the public use clauses of the state and federal constitutions. The United States Supreme Court has accepted certiorari in the case. Kelo v. City of New London, Conn., *cert. granted*, 125 S.Ct. 27, 73 USLW 3178, 73 USLW 3204 (U.S. Conn. Sep 28, 2004) (NO. 04-108).

If this Court is prepared to de-link the ad valorem property tax from the public use exception for improving truly blighted real property -- and in so doing

permit the use of pure tax dollars to finance a corporation's profit motives -- it should consider examining anew the public use exception and the abuses that have now arisen as a result of this Court's interpretations of the constitution.

Conclusion

For the reasons expressed here and in Appellants' opening brief, the trial court erred in granting St. Peters', the State's and Costco's motions for summary judgment. The trial court should have declared the use of tax money to assist Costco in its for-profit, corporate endeavors violated art. VI, §§ 23 and 25.

VII. AFFIRMATIVE DEFENSES

A. Respondent's Affirmative Defenses are Not Properly Pleaded

St. Peters' brief does not contradict Appellants' claim that Respondent did not properly plead the affirmative defenses it asserts. This argument was properly preserved when Appellants filed their Motion to Strike Affirmative Defenses Pleaded by St. Peters, (LF 001115) and Plaintiffs' Suggestions in Support of Plaintiffs' Motion to Strike Affirmative Defenses Pleaded by St. Charles (LF 001109) on October 16, 2002. "A claim that an affirmative defense has not been pled with the particularly [sic] required by Rule 55.08, is waived if not raised by motion of the opposing party." Tindall v . Holder**,** 892 S.W.2d 314, 325 (Mo. App. S.D. 1994); Walters Auto Body Shop, Inc. v. Farmers Insurance Company, Inc., 829 S.W.2d 637, 640 (Mo. App. W.D. 1992)("particularity requirement will be waived if it is not attacked by motion of the opposing party.") The trial court did not issue a ruling on this Motion. Nevertheless, the Motion to Strike put St. Peters on notice of the flaws in its pleadings; St. Peters never amended its pleading of the affirmative defenses to correct their fatal errors.

The conclusory allegations asserted by Respondent in its affirmative defenses are insufficient. "Because the purpose of rule 55.08 is to provide notice to the plaintiff so the plaintiff can be prepared for trial on the issues, the facts supporting an affirmative defense must be pled in the same manner as required in alleging a claim such that mere conclusory allegations are insufficient." Mobley

v. Baker, 72 S.W.3d 251, 258 (Mo. App. W.D. 2002). "Requiring a claimant to negate mere conclusory allegations with respect to an affirmative defense as a prerequisite to establishing a *prima facie* case for summary judgment would require the movant to first make the non-movant's case and then defeat it." Id.

Here, Respondent St. Peters failed to plead with particularity the date it claimed the statute of limitations began to run in this case or the particular Counts of the petition against which it claims the statute has run. Plaintiff had no notice whether St. Peters asserted that the statute ran on its claims relation to the 1992 ordinances, the Costco ordinances passed in 2000, or both. As a result, Appellants were required first to make St. Peters' case for the dates it might have chosen and then defeat them. Further, the trial court's order failed to distinguish between the 1992 ordinance causes of action and those challenging the 2000 ordinances.

A party should not be left to guess against which claims, if any, a statute of limitations affirmative defense is asserted. By stating mere conclusions, Respondent St. Peters failed to carry its burden to plead its affirmative defenses. Metropolitan St. Louis Sewer District v. Zykan, 495 S.W.2d 643, 657 (Mo. 1973).

In Green v. City of St. Louis**,** 870 S.W.2d 794 (Mo. banc 1994), upon which Respondent relies, the court held that an affirmative defense may be raised for the first time in a motion for summary judgment. The affirmative defense pleaded there was one that went to the jurisdiction of the court to hear the case. The Supreme Court made clear that because the affirmative defense at issue in that

case went to the subject matter jurisdiction of the court, it could be raised for the first time in the summary judgment motion. Indeed, as this Court is aware, subject matter jurisdiction can be raised at any point in the proceedings, and may be raised for the first time even on appeal.

B. Appellants' claims are not barred by the statute of limitations.

St. Peters did not plead with particularity its statute of limitations affirmative defense. St. Peters did not plead whether it was invoking the statute of limitations as to the 1992 ordinance, the 2000 ordinance, or both.

Reduced to its essence, Respondent St. Peters' argument concerning the statute of limitations issue is this:

- The TIF ordinance created the liability or obligation sued upon;
- The ordinance established the fact of damage, but not the amount;
- Damages were capable of ascertainment because the ordinance gave rise to the right to sue; and
- City of Velda v. Williams, 98 S.W.3d 880 (Mo. App. E.D. 2003) does not apply because the suit there was originated against an officer and this case is against a city.

Section 516.100 provides that the statute of limitations begins to run not when the wrongful act is done, but when the damages are "sustained **and** capable

of ascertainment…" (emphasis supplied). This is a two part test; both elements must be present to begin the running of the statute of limitations. Respondents' argument changes the statute, deleting the "and" and substituting an "or."

Respondents' argument is that anytime a wrongful act is done (the passing of a void ordinance, for example) damages are capable of ascertainment at that point. But damages are not sustained until, as here, actual payment is made in 1995. And § 516.100 by its own language defeats St. Peters' argument. A "cause of action shall not be deemed to accrue when the wrong is done or the technical breach of contract or duty occurs, but when the damage resulting therefrom is sustained and is capable of ascertainment…." Id.

Thus, the damage must be sustained before the statute runs. If it is not sustained, a party is without any damage and would not have standing to sue. See, e.g., Pace Construction Co. v. Missouri Highway and Transportation Comm'n, 759 S.W.2d 252 (Mo. App. W.D. 1988)(Merely being a taxpayer is not alone enough to possess standing). And *see* Brock v. City of St. Louis, 724 S.W.2d 721, 725 (Mo.App.1987)("In order to assert a taxpayer claim based on illegal or improper expenditure of funds plaintiff must allege facts showing special injury in the form of an increased tax burden.") (emphasis supplied).

Section 516.100 is clear when it speaks about damages. The damages must first be sustained. If person A says "I may hit you some day," person B cannot sue until person B is actually hit. Here, St. Peters passed an ordinance that said, "We may bill you for PILOTS and EATS some day." It was not until St. Charles

County received the bill and paid the PILOTS and EATS that its damages were sustained.

By focusing on the "capable of ascertainment" language in the statute, and ignoring the plain requirement that injury be sustained, Respondents argue that it is the potential, rather than fact of damages that is controlling.

After the payments were made, and only after the payments were made, was the right to sue both sustained **and** capable of ascertainment under § 516.100.

Respondents attempt to distinguish City of Velda v. Williams, 98 S.W.2d 880 (Mo. App. E.D. 2003), a case on all fours with this one, by arguing it applies only when city officers are sued. They claim that because the statute of limitations being applied in City of Velda applied only against an officer of a city, that this in some way provides a basis for distinguishing the plain holding of that case that injury was sustained when the mayor unlawfully took the funds at issue. Respondents claim that because the County sued the city in this case, and not its officers, City of Velda simply doesn't apply.

The difference between § 516.120 and § 516.130 has nothing to do with the holding in City of Velda. This is because City of Velda does not depend on the nature of the parties in the litigation; the issue in City of Velda is whether the damage is sustained and capable of ascertainment. In City of Velda it is the wrongful taking of money under the ordinance, not the passage of the ordinance itself, that causes the city to sustain damage. In City of Velda, if the Mayor had not taken any of the salary, irrespective of her unlawful vote, no injury would have

been sustained. Until that injury was sustained – until money was taken from the city treasury – the damages were not sustained **and** capable of ascertainment.

St. Peters misreads City of Velda.

St. Peters also makes the remarkably disingenuous argument that St. Charles County's payments accrued in 1993 and thus the statute began to run then. (St. Peters Br. at 86 citing LF 748). The previous page in the legal file shows that the damages were never sustained. "The assessed value of the property in the area did increase by $31,560…; however, these revenues were not captured…. The incremental sales tax … was also not captured." In other words, St. Charles County paid nothing in 1993 -- sustained no damage -- by St. Peters' own accounting.

Respondents cite State ex rel. Robb v. Poelker**,** 515 S.W.2d 577 (Mo. 1974), which stands for the proposition that statutes of limitation are applicable against subdivisions of the State. St. Charles County does not dispute this in its Appellants' brief. In Poelker, the City of St. Louis brought a mandamus action seeking to have a debt it owed to the State offset against an existing unpaid debt the State owed to the City. The State's debt arose as a result of care the City provided to State insane and tuberculosis patients in the City between 1940 and 1963. The City's claim for offset was addressed to the Court for the first time in 1974, eleven years after the last date the City provided the service for which it claimed reimbursement from the State. There were no continuing payments from the State to the City, nor additional unpaid services rendered by the City hospitals

on the State's behalf, after 1963. Nor was there any dispute that the services rendered by the City was inappropriate or against any tenet of law. In fact, the existence of the debt, and its legality, were undisputed. The Court ruled that the statute of limitations barred the City's claim for payment of the eleven year old debt.

The present case does not involve debt payments for services previously provided. Rather, it involves ongoing annual payments by St. Charles County to St. Peters for what St. Peters claims will be lawful TIF projects and blighted area restoration. Appellants challenge the propriety of the TIF mechanism employed by St. Peters, the City's ability to charge the County for its actions and the appropriateness of the uses to which St. Peters allocates the funds paid to it by the County. Poelker is not on point and does not support Respondents' argument that the statute of limitations bars Appellants' claims against it.

Respondent cites Lato v. Concord Homes, Inc., 659 S.W.2d 593 (Mo. App. E.D. 1983) as an argument against St. Charles County's assertion that damages in the present case were not "capable of ascertainment" until PILOTS and EATS were actually paid to the special allocation fund. In Lato, an action by property owners against their contractor for alleged defects in the construction of the sewer at their home, the Court found that the case involved a single wrongful act – the delivery of the property with a defective sewer line. The Court held that the plaintiff could not rely on Davis v.Laclede Gas Co., 603 S.W.2d 554 (Mo. 1980) because, unlike Davis**,** the case did not present the particular circumstances

wherein "the wrong may be said to continue from day to day, and to create a fresh injury from day to day." Id. at 595.

Respondent's reliance on Lato is likewise misplaced. This case presents the particular circumstances wherein St. Charles County's annual payments of PILOTS and EATS are a continuing wrong and create a fresh injury from day to day. In fact, Appellants cite Davis as authority on this very point in support of its position that each payment of PILOTS and EATS by the County extends the statute of limitations for five years from the date of the last payment.

Similarly, in Rose v. City of Riverside**,** 827 S.W.2d 737 (Mo. App.W.D. 1992), cited by Respondent, a property owner sued the City because he had difficulty selling property designated by ordinance as a flood plain in 1977. Plaintiff Rose inherited the property in 1988. The Court ruled that the restrictive nature of the ordinance should have alerted the original owner at the time the flood plain ordinance was passed that the value of his property was diminished and consequently more difficult to sell. Therefore, it was at that time that the damage was capable of ascertainment. Further, any damage suffered as a result of a "taking" would have been suffered by the original landowner at the time the land was designated by ordinance as a flood plain and this damage claim would not pass to Rose as a grantee of the land.

Again, Rose does not address the argument put forth by Appellants in their brief. Appellants do not dispute the value of the land contained in the SPCRA, nor is there any attempt to sell this land. Unlike this case, there were no ongoing

payments at issue in Rose. Because the property value was the basis of the claim, the court held that the moment of the passage of the ordinance that caused the diminution in value was the only point in time at which the damages were capable of ascertainment. Unlike this case, there was no issue of ongoing payments that could extend the statute of limitations beyond the date of the passage of the ordinance. Rose is inapposite.

Conclusion

The trial court erred in applying the § 516.120 statute of limitations in this case and sustaining the Respondent, St. Peters', Motion for Summary Judgment on that basis.

VIII. ST. PETERS' ANNUAL BILLS FOR PILOTS ARE CONTINUING WRONGS.

St. Peters' annual bills for PILOTS and EATS to St. Charles County constitute a continuing wrong, with each bill tolling the statute of limitations.

St. Peters' argument on this issue begins and ends with its continuing confusion about St. Charles County's claims in Counts I-IV. Again, St. Charles County does not assert that the 1992 ordinances are invalid on their face. Indeed, St. Charles County concedes that the 1992 ordinances are valid for purposes of the creation of a redevelopment ***area***. It is the attempt to collect PILOTS and EATS using those ordinances as authority, and the use of PILOTS and EATS to fund the city's Rec-Plex, that are the damages in this case. Neither of those existed until payments were made and continue to be made by St. Charles County

Thus, when St. Peters says that there is only one element of damages -- "the passage of the ordinance adopting tax increment financing" (St. Peters Br. at 89) -- St. Peters is merely attempting to turn the argument to a place where it has some chance of prevailing. But that argument has no place in this case, where the damages are not sustained until payments are made each year.

Respondent's reliance on Lato is likewise misplaced. This case presents the particular circumstances wherein St. Charles County's annual payments of PILOTS and EATS are a continuing wrong and create a fresh injury from day to day. Lato distinguishes Davis. And Davis is authority on this very point in

support of St. Charles County's position that each payment of PILOTS and EATS by the County extends the statute of limitations for five years from the date of the last payment.

St. Peters next cites Janssen v. Guaranty Land Title Co., 571 S.W.2d 702 (Mo. App. 1978) for the proposition that St. Charles County could have challenged the facial validity of the 1992 ordinances by declaratory judgment when they were passed. This is perhaps true, but irrelevant. St. Charles County had no need to and does not now challenge the validity of the 1992 ordinances for all purposes; the challenge is only to the collection of PILOTS and EATS and their use for the Rec-Plex, not the creation of the SPCRA. It was only when St. Charles County sustained its damages -- and they were sustained with each bill from St. Peters -- that the statute of limitations began to run.

St. Peters invokes Rodgers v. Thomas, 193 F.952 (8th Cir. 1911), which involved bonds that were issued and, eight years later, challenged. There was no continuing wrong as the claim was that the bonds were irregular on their face. Indeed, the court noted that the parties had "full knowledge of facts…." Id. at 957. That fact is absent here. Here the ordinances were valid for the purposes their words conveyed -- to create a redevelopment area. They were not valid for the collection of PILOTS and EATS, an act by St. Peters that did not occur until 1995 and continues each year.

Similarly, St. Peters' reliance on Canady v. Coeur d'Arlene Lumber Co., 120 P. 830 (Idaho 1911) is misplaced. There a city passed ordinances that vacated

streets and alleys. A suit challenging those ordinances was filed more than five years after their passage. In Canady, as in Rose, the damages were sustained when the ordinance became effective.

Again, here the damages were not sustained until payments were made. And they are sustained each year that St. Peters sends a bill for a new amount based on that year's assessments and sales tax receipts. None of these amounts can be known in advance of each year's calculation. Each bill is, therefore, a continuing wrong.

Conclusion

The trial court erred in sustaining St. Peters' Motion for Summary Judgment on the basis of the statute of limitations.

IX. ST PETERS DID NOT PROPERLY PLEAD ITS EQUITABLE AFFIRMATIVE DEFENSES.

St. Peters did not properly plead its equitable affirmative defenses. As previously shown, this argument was properly preserved. See, pp. 40-42, supra.

Respondent failed to plead with sufficient particularity its affirmative defenses of laches, estoppel, or waiver. By stating mere conclusions, Respondent St. Peters failed to carry its burden to plead its affirmative defenses. Metropolitan St. Louis Sewer District v. Zykan, 495 S.W.2d 643, 657 (Mo. 1973).

A. Laches

"Equity does not encourage laches…. Laches cannot be invoked to defeat justice. It will be applied only where enforcement of the right asserted would work an injustice. … The burden of proof as to laches rests on the party asserting it." Metropolitan St. Louis Sewer District v. Zykan, 495 S.W.2d 643, 657 (Mo. 1973). Respondent St. Peters has not met its burden.

Importantly, the Rec-Plex was open and in operation before St. Charles County received its first bill for PILOTS and EATS. Under St. Peters' argument, once ground was broken, it was too late for St. Charles County to challenge the Rec-Plex either on the ground that St. Peters was taking St. Charles County tax revenues for a purely public purpose or on the ground that the 1992 ordinances did not authorize St. Peters to collect PILOTS and EATS. Under St. Peters' laches argument, St. Charles County would have to have brought its actions before it

incurred damages and before St. Peters did any unlawful act. No case, including Judge Wolff's concurrence in Green v. Lebanon R-III School District, 13 S.W.3d 278, 287 (Mo. banc 2000) supports such an argument. St. Peters cannot create "settled expectations" that would pretermit any legal action by building quickly and waiting to send the first bill until the work is done.

1. Laches does not apply against St. Charles County as a government entity.

The principle that the State is not affected by the laches of her agents was sanctioned by the Missouri Supreme Court in the case of Park v. State, 7 Mo. 194 (1841), and reiterated in Marion County v. Moffett, 15 Mo. 604, (1852). Although later courts have questioned the principle, it remains intact. See, Larocca v. State Board of Registration for the Healing Arts, 897 S.W.2d 37, 45, (Mo. App. E.D. 1995); Scheble v. Missouri Clean Water Commission, 734 S.W.2d 541, 560 (Mo. App. E.D. 1987).

> The doctrine, that laches is not imputable to the government, is founded on considerations of policy. The State can only act through her officers, and her transactions are so multiplied and her agencies so numerous, that great losses must result from maintaining that she is liable for the laches of those to whom she is compelled to intrust the management of her pecuniary concerns.

Marion County v. Moffett, 15 Mo. 604 (1852). The management of St. Charles County's pecuniary concerns has been entrusted to the county executive and his

staff. The actions of those officers in carrying out their governmental duties should not be held against the County when its governmental interests are at stake. Laches should not apply to bar the claims of St. Charles County so that the interests of its citizens may be fairly adjudicated on the merits.

Respondent relies on State v. Eagleton, 393 S.W.2d 516 (Mo. 1965), and Cherry v. City of Hayti Heights, 563 S.W.2d 72 (Mo. 1978), both of which stand for the proposition that the State may be barred by laches from successfully maintaining an action in quo warranto attacking the validity of a village, city or school district. They are inapposite to the facts and issues in the present case. However, the Court in both cases noted that an important factor to be considered is a showing of any detriment to accrue to the other party from permitting the acts complained of to continue. In the instant case, Appellants do argue that there is considerable detriment to the County and its citizens in permitting Respondent St. Peters to continue to draw funds from the County to which it is not legally entitled and for purposes that are not legally sanctioned.

Likewise, Simpson v. Stoddard County, 73 S.W. 700 (Mo. 1903), and Dunklin County v. Chouteau, 25 S.W.552, (Mo. 1894), also cited by Respondents, are limited to the applicability of the doctrine of laches against a county on the issue of the character of swamp land subscribed to a railroad. Again, the Courts note that the character of the respondent is a factor to be considered in their decision in that the purchasers of the land at issue in these cases were not the original purchasers, "but they stand before the chancellor as innocent purchasers

for value, in good faith. Their position entitles them to every favorable presumption in their behalf." Simpson, at 712.

Here, Respondent St. Peters does not stand in the position of an innocent party. Indeed, the acts of Respondent in the establishment and implementation of the SPCRA redevelopment, and the propriety of those acts, are at the very heart of this dispute. Therefore, St. Peters is not entitled to obtain relief from scrutiny of those acts by application of the doctrine of laches.

Furthermore, the Court in Dunklin County goes on to caution that care must be taken in applying the doctrine of laches to a county or other municipal corporation.

> As experience shows that the officers of public and municipal corporations do not guard the interests confided to them with the same vigilance and fidelity that characterizes the officers of private corporations, the principle of ratification by laches or delay should be more cautiously applied to the former than to the latter.

Dunklin County, 25 S.W. at 557.

2. Appellants did not unreasonably delay the filing of their lawsuit against St. Peters.

"Laches is the neglect for an unreasonable and unexplained length of time under circumstances permitting diligence, to do what in law, should have been done. There is no fixed period within which a person must assert his claim or be barred by laches. The length of time depends upon the circumstances of the

particular case." Metropolitan St. Louis Sewer District v. Zykan, 495 S.W.2d 643, 656 (Mo. 1973). "Knowledge of the situation is required by the one against whom laches is asserted." Stenger v. Great Southern Savings and Loan, 677 S.W.2d 376, 383 (Mo. App. S.D. 1984). Respondent St. Peters' arguments are all based on their assertion that Appellants knew of the impropriety of St. Peters' acts from the moment Ordinances 1961 and 1962 were passed. This is misleading.

"Equity will not aid a party who comes into court with unclean hands." Chaney v. Cooper, 954 S.W.2d 510, 518 (Mo. App. W.D. 1997). In truth, the City of St. Peters misled St. Charles County, the County Executive, the taxpayers, and the State of Missouri about how the TIF funds were actually being spent.

Appellants filed their lawsuit against St. Peters when it was finally disclosed that St. Peters was utilizing all of the TIF Funds to finance the City's REC-PLEX. The 1998 Tax Increment Financing Annual Report filed by St. Peters with the Missouri Department of Economic Development (LF 000778) states that St. Peters' expenditures for Projects within the TIF showed ***zero expenditures***. (LF00782). When Plaintiff Joe Ortwerth, the St. Charles County Executive, pressed the City for an accounting of how the TIF Funds the County had been paying to St. Peters were being used, St. Peters finally admitted where the funds were actually going. The next filed report showed $14,447,763.25 in TIF expenditures for the Rec-Plex and nothing for any other project or improvement. (LF00787).

St. Peters attempted to hide the true uses to which it was putting the TIF funds. Its hands are not clean and it cannot invoke equity in aid of its subterfuge. "[T]he doctrine of unclean hands requires that a party coming into a court of equity must have acted in good faith as to the subject matter of the lawsuit." Crawford v. Detring, 965 S.W.2d 188, 193 (Mo. App. 1998).

Appellant St. Charles County filed its lawsuit within months of learning of St. Peters' use of the TIF funds exclusively for the Rec-Plex.

When the Ordinances were originally passed, Appellants could reasonably believe that Respondent St. Peters would act in good faith and would properly designate individual redevelopment projects within the SPCRA as the law required and as it did when it finally advanced the Costco project. Appellants also reasonably believed that St. Peters would use the tax revenues it collected to make the much-needed improvements that it stated it would make to the blighted land contained within the SPCRA. Only at a later point in time, after St. Peters was demanding payment of funds from St. Charles County, did it became apparent that those funds were being entirely diverted to pay for St. Peters' Rec-Plex. This use of TIF funds for a public facility is in contravention of the TIF statutes. Such use was not established in Ordinances 1961 or 1962 at the time of their passage. The City's failure to utilize TIF funds to eradicate conditions of blight in the SPCRA was also not established in Ordinances 1961 or 1962 at the time of their passage.

The circumstances of this case warranted the delay in filing of Appellants' lawsuit. There was no unreasonable or unexplained delay on the part of

Appellants, and the imposition of the doctrine of laches by the trial court against Appellants was in error.

3. The trial court failed to weigh the prejudice to both parties caused by application of the doctrine of laches.

Ordinarily, laches is a question of fact to be determined from all the evidence and circumstances adduced at trial. Hagely v. Board of Education of Webster Groves, 841 S.W.2d 663, 670 (Mo. banc 1992).

The doctrine of laches is appropriately applied where one party's delay materially prejudices a party-opponent. Estate of Holtmeyer v. Piontek 913 S.W.2d 352, 356 (Mo. App. E.D. 1996). "The generally accepted doctrine appears to be that laches is not like limitation a mere matter of time, but is principally a question of the inequity of permitting a claim to be enforced, this inequity being founded upon some change in the condition or relations of the property or the parties." Lyman v. Walls**,** 660 S.W.2d 759, 761 (Mo. App. E.D. 1983). "[A] court considering estoppel and laches should give regard to the equities and conduct of all the parties." Stenger v Great Southern Savings and Loan Association, 677 S.W.2d 376, 383 (Mo. App. S.D. 1984)(emphasis added.)

In Hagely, a case cited by St. Peters, teachers sued the school board for back pay from salary adjustments they claimed had been improperly denied to them. The Supreme Court remanded the case to the trial court for further evidence on the issue of the prejudice to each party and the applicability of the doctrine of laches to the evidence. The Supreme Court directed the trial court "to

determine whether the harm to the [respondent] in allowing the suit to proceed outweighs the harm to appellants in failing to consider their claims." Hagely, at 670. (emphasis added.)

Respondent St. Peters would have this Court believe that only St. Peters' perceived prejudice is worthy of consideration in this case. Respondent, and the trial court, have failed to consider the prejudice that Appellants will suffer if their claims are *not* allowed to proceed. However, as made clear in Lyman v. Walls, Stenger v. Great Southern Savings, and Hagely v. Board of Education, precedent requires that the interests of both parties must be weighed in determining whether laches should apply.

The prejudice that Appellants will suffer if the grant of summary judgment stands and St. Peters is allowed to continue to improperly drain funds from the County must be considered. As outlined in the Stipulated Statement of Facts contained in Appellants' Brief, St. Charles County collects taxes, pursuant to voter approval, as follows:

> 7. St. Charles County imposes a ½ cent general sales tax and has since the adoption of the SPCC Redevelopment Plan by St. Peters.
>
> 8. St. Charles County imposes a ½ cent transportation sales tax and has since the adoption of the SPCC Redevelopment Plan by St. Peters.

9. St. Charles County imposes a ¼ cent capital improvements tax and has since the adoption of the SPCC Redevelopment Plan by St. Peters.

10. St. Charles County imposes a ¼ cent general sales tax and has imposed that tax since the adoption of the SPCC Redevelopment Plan by St. Peters.

11. St. Charles County also collects ad valorem taxes on real property within St. Charles County.

Further, the Stipulated Statement of Facts also details the amounts paid by St. Charles County to St. Peters as follows:

52. From inception of the SPCC Redevelopment Plan until August 30, 2002, the Special Allocation Fund for the SPCC Redevelopment has received $1,012,510.09 in EATS resulting from sales tax levies on economic activities within the SPCC Redevelopment Area.

53. From the inception of the SPCC Redevelopment Plan until August 30, 2002, St. Charles County has received $1,012,510.09 in sales tax revenues resulting from sales tax levies on economic activities within the SPCC Redevelopment Area.

54. From inception of the SPCC Redevelopment Plan until August 30, 2002, the Special Allocation Fund for the SPCC

Redevelopment has received $3,799,167.19 in PILOTS.

In addition, Barbara Walker, the St. Charles County Collector, provided an affidavit setting out the total of all funds paid by St. Charles County to the SPCRA (TIF District 2) at $3,799,167.16, commencing with the ***first disbursement*** in 1995 until April 25, 2002. (LF 805-808).

The funds paid by St. Charles County to St. Peters are funds that could otherwise be used by the County to provide facilities and services to County residents in accordance with the mandates for which those taxes were levied. Among the claims in this lawsuit, Appellants allege that St. Peters is collecting tax revenues from the County that encompass the entire SPCRA, far in excess of what is allowed for an individual project within the SPCRA. If the summary judgment ruling is reversed St. Charles County tax revenues that are now going to St. Peters to fund its Rec-Plex would be available in the future to fund County budget requests for additional sheriff's deputies, corrections officers, prosecuting attorneys and assessors that the County is currently forced to leave unfunded. Capital improvement tax revenues would be available for the expansion of the sheriff's building and jail. And transportation sales tax revenues that are now going to St. Peters to fund its Rec-Plex would be available to St. Charles County for desperately needed construction and repair of roads and bridges throughout the County.

Laches should not bar a claim where (1) the party against whom laches is asserted is exercising a public trust to protect the public treasury; (2) the party

claiming that laches should apply comes to the court with unclean hands, having misled the County about the use of TIF funds; (3) the party against whom laches is asserted also faces substantial detriment as a result of the illegal actions of the party claiming laches.

B. Estoppel and Waiver

"[T]he equitable defenses of laches and estoppel are closely related. Both are unfavored theories. Every fact required to create an estoppel must appear by clear and satisfactory evidence." Stenger v. Great Southern Savings and Loan Association, 677 S.W.2d 376, 383 (Mo. App. S.D. 1984). (Internal citations omitted.) "[A] court considering estoppel and laches should give regard to the equities and conduct of all the parties. Id.

St. Peters claims that Appellants' right to challenge Ordinances 1961 and 1962, the propriety and implementation of the SPCRA and the Redevelopment Plan, and the use of the funds being paid to Respondent are all precluded under estoppel because St. Charles County has received some perceived benefit from this TIF Redevelopment.

St. Charles County has not received the benefits from the TIF Redevelopment that St. Peters alleges. Rather, St. Charles County has incurred financial detriment and the majority of the areas of blight within the SPCRA remain in their original state of blight. There has been no "rejuvenation of the Area from one of blight … to one of economic vitality…"as St. Peters claims.

(Respondent's brief at 96.) Instead, the perimeter of the SPCRA has been expanded by St. Peters so as to include a JC Penney store, an Executive Center, and a Doctor's office building, all of which were constructed without the benefit of TIF funds or incentives. In addition, the City's Rec-Plex, a public facility, has been constructed in defiance of the mandates of the TIF law. St. Peters also fails to inform the Court that improvements in the Costco project were made exclusively on private property and that the improvements were made pursuant to a grant of public money to a private corporation – that prior to Costco, all of the road improvements made in the SPCRA were made using non-TIF funds, including County transportation sales tax funds, a portion of which St. Peters was taking under the TIF law to fund the Rec-Plex.

St. Peters' statement in its brief that Appellants' arguments on appeal "misunderstand the very nature of TIF Redevelopment" is not correct. Appellants do not disagree that redevelopment laws were instituted to provide a mechanism for municipalities to eradicate conditions of blight, as Respondent's case, Annbar Associates v. West Side Redevelopment Corp., 397 S.W.2d 639, (Mo. banc 1965), proclaims.[4] Nor do Appellants disagree with Respondent's statement that the mechanism of TIF is to pledge the revenues resulting from the increased assessed valuation and the increased economic activity redevelopment provides. What Appellants do disagree with is whether St. Peters has complied with the legal

[4] Annbar was decided in 1965, the TIF statutes were not enacted until 1982.

requirements for establishing the SPCRA, and the legality of taking tax revenues from one taxing district to fund a City building. When the TIF Redevelopment was originally created, it was reasonable for Appellants to believe that the PILOTS and EATS funds that St. Charles County was required to pay to St. Peters would be used for public infrastructure improvements in the SPCRA and to eradicate blight. Appellants became compelled to challenge St. Peters' use of the County's funds when it became clear that those funds were being siphoned by the City into its Rec-Plex and that areas of blight were remaining unabated.

Respondent St. Peters also attempts to argue that St. Charles County endorsed the Rec-Plex, therefore, it has waived its right to challenge the mechanism by which this city facility was created. To the extent that St. Charles County endorsed the idea of the Rec-Plex, it did not consent to St. Peter's establishment of the TIF for that purpose or the diversion of TIF funds to the City's own Rec-Plex facility.

"[E]stoppel arises from the unfairness of permitting a party to belatedly assert rights if he knew of those rights but took no steps to enforced them until the other party has, in good faith, become disadvantaged by changed conditions." Stenger, 677 S.W.2d at 383.

St. Peters has not acted in good faith in either the creation or administration of this TIF Redevelopment. "[K]nowledge of the situation is required by the one against whom laches asserted. This is likewise true of estoppel." Stenger, 677 S.W.2d at 383-4. As outlined above, Appellants filed their Petition against St.

Peters when St. Peters finally acknowledged the fact that it was diverting all the TIF funds to the City's Rec-Plex facility. Until then, all that St. Charles County could have known was that St. Peters might do so. The only unfairness that arises in this case is not allowing Appellants to assert their rights against St. Peters in this lawsuit.

Conclusion

The trial court erred in granting summary judgment on the basis of laches, estoppel and the statute of limitations.

X. SOVEREIGN IMMUNITY

At Point X of its opening brief, St. Peters argues that St. Charles County's claims in this case are barred by sovereign immunity. St. Peters relies on two cases for this novel proposition: Community Federal Savings & Loan Assoc. v. Director of Revenue, 752 S.W.2d 794 (Mo. banc 1988) and Lett v. City of St. Louis, 948 S.W.2d 614 (Mo. App. E.D. 1996). The Court need not linger long on this argument.

In Community Federal, certain savings and loan taxpayers sought a refund of intangible property taxes they had paid after the tax was declared unconstitutional. The Supreme Court held that sovereign immunity barred the claim for refund of the tax against the state in the absence of a waiver of sovereign immunity. The Court held: "Accordingly, in the absence of statutory authority, taxes voluntarily, although erroneously paid, albeit under an unconstitutional statute, cannot be refunded." Id. at 797.

Lett involved a claim by taxpayers that the city unlawfully assessed earnings tax against amounts taxpayers contributed to deferred compensation plans. The taxpayers also sought a refund of unlawfully collected earnings taxes, but had not paid the taxes under protest as required by § 139.031, RSMo 1994. The Court held that because the taxpayers failed to show that they paid under protest, they were not legally entitled to a refund.

Appellants do not claim that the sales or ad valorem taxes paid within the SPCRA were improperly paid. St. Charles County had a right to collect both the ad valorem taxes it was due on SPCRA real property and its share of the sales taxes its voters had approved to finance the county's transportation, capital improvements and general revenue needs.

The claim in this case is not a claim by a taxpayer that a tax was not properly collected; it is a claim that the TIF Act and/or the state constitution did not permit St. Peters to divert taxes paid to St. Charles County to St. Peters' use because St. Peters did not follow the requirements of the TIF Act or that the constitution prohibits the collection of the taxes for the purposes to which St. Peters put them.

Community Federal and Lett do not apply in this case because there is no claim that the core taxes were illegal. St. Peters cites no case that prohibits a county from recovering taxes it legally collected from a city that illegally diverted the county's money to its own use.

Conclusion

Sovereign immunity does not bar Appellants' action.

(**APPELLANTS'/CROSS-RESPONDENTS' REPLY TO RESPONDENT/CROSS-APPELLANT'S POINT RELIED ON XI)**

XI. THE TRIAL COURT DID NOT ERR IN OVERRULING THE RESPONDENTS'/CROSS-APPELLANTS' MOTION FOR ATTORNEYS' FEES IN THAT NONE OF THE BASES FOR APPLYING AN EXCEPTION TO THE AMERICAN RULE EXISTS IN THE MOTION FOR ATTORNEYS' FEES FILED BY THE RESPONDENTS/CROSS-APPELLANTS AND THUS THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FAILING TO FIND SPECIAL CIRCUMSTANCES IN THIS CASE.

STANDARD OF REVIEW.

The trial court has broad discretion to award attorney's fees and its decision will not be overturned unless it abuses that discretion. Consolidated DCW Enterprises, Inc. v. Terre du Lac Association, Inc., 953 S.W.2d 127, 133 (Mo. App. E.D. 1997), citing Consolidated Public Water Supply Dist. v. Kreuter, 929 S.W.2d 314, 316 (Mo. App. 1996)

While Missouri Supreme court Rule 87.09 states that "[i]n any proceeding under Rule 87 the court may make such award of costs as may be equitable and just.", Missouri courts apply the American Rule in determining if attorney's fees will be awarded as a part of costs. The American Rule "states that absent statutory authorization or contractual agreement, each litigant, with few exceptions, must

bear the expense of his own attorneys' fees…." Mayor, Councilmen, and Citizens of the City of Liberty v. Beard, 636 S.W.2d 330, 331 (Mo. banc. 1982).

The two exceptions upon which St. Peters' relies in arguing that the trial court abused its discretion are the "special circumstances" and "balance of the benefits" exceptions.

A. THE "SPECIAL CIRCUMSTANCES" EXCEPTION

Application of the special circumstances exception to the American Rule "is narrow and must be strictly applied." Washington University v. Royal Crown Bottling Company, 801 S.W.2d 458 (Mo. App. 1990).

The primary source of the special circumstances exception is Bernheimer v. First National Bank of Kansas City, 225 S.W.2d 745 (Mo. banc. 1950). Bernheimer was an action in equity to obtain construction of a testamentary trust for the purpose of determining whether a minor plaintiff was the lawful issue of his father. The court acknowledged that these were indeed special and unusual circumstances and awarded attorneys' fees. The Court reasoned that there was an ambiguity in the phrase "lawful issue" and the resolution of its meaning was "important to the testamentary trustees in ascertaining the meaning of the will, and in charting a course for the administration of the trust estate." Since other parties directly benefited from the ruling, the trust was required to bear part of the costs of the attorneys.

Outside of Bernheimer, the special circumstances exception appears to have resulted in an award of attorneys' fees only in two cases. The first is a case involving intentional misconduct by a party. In Temple Stephens Company v. Westenhaver, 776 S.W.2d 438, 443 (Mo. App. S.D. 1996), the Court noted that the plaintiff "incurred attorney fee expenses which it would not have incurred except for Mr. Roemer's intentional omission of its name from the list of property owners filed with the rezoning application. Special circumstances exist supporting the award of attorneys' fees as costs…." In applying the special circumstances exception narrowly, the court noted that even though the partnership in which Mr. Roemer participated benefited from his misconduct, "this alone is not justification for an award of attorneys' fees under any partnership theory, nor is it a special circumstance justifying an award of attorneys fees as costs…."

The second case, Feinberg v. Adolph K. Feinberg Hotel Trust, 922 S.W.2d 21 (Mo. App. E.D. 1996), is also a trust case. There the court announced a rule permitting courts to assess attorneys' fees when a trustee engages in self-dealing. The court also "expressly limited our new rule to the unusual circumstances of this case." Id. at 27.

In Feinberg, the Appellants sought attorneys' fees pursuant to the Temple Stephens holding. Specifically, the Appellants in Feinberg alleged that the deliberate conduct of the City during an involuntary annexation proceeding met the special circumstances exception in the American Rule. The Court agreed that the attorneys' fees would not have been incurred but for the City's deliberate

conduct, but rejected the argument that the trial court erred in failing to award attorneys' fees because there was no evidence that the City acted in bad faith or with a wrongful purpose.

B. THE "SPECIAL CIRCUMSTANCES" EXCEPTION DOES NOT APPLY IN THIS CASE

What are these "special circumstances" St. Peters claims exist? St. Peters asserts that "special circumstance" exist because the "city successfully defended Missouri's TIF Act." St. Peters' Br. at 102.

St. Peters does not cite a single case that supports its assertion that this is a type of special circumstance that warrants an award of attorneys' fees. Special circumstances have been found where deliberate misconduct, bad faith or wrongful purpose exists. No evidence of any deliberate misconduct, bad faith or wrongful purpose on the part of Appellants/Cross-Respondents was before the trial court. The reason no case is cited by St. Peters to support its assertion that the trial court abused its discretion in denying the motion for award of attorneys' fees is that there are no special circumstances here.

St. Peters complains that the Appellants/Cross-Respondents dismissed their original action and refiled their action. The fact that Appellants/Cross-Respondents chose more narrowly to focus their case and decrease the Court's burden by filing a new case that clearly stated those issues and identified new violations of the statute by the City is not grounds for the City declaring victory in

that case or for an award of attorneys' fees. As Washington University v. Royal Crown Bottling Company of St. Louis, 801 S.W.2d 458, 469 (Mo. App. E.D. 1990), noted: "The taking of inconsistent positions by parties to litigation is a common, if not tolerated, practice and hardly makes this a 'very unusual' case or amounts to a 'special circumstance.'" Appellants/Cross-Respondents in this case have not even taken inconsistent positions. Surely this is not a "very unusual" case, nor does it present "special circumstances."

Likewise, there is no basis arising from the holding in the Feinberg case that there should be attorneys' fees awarded in this matter in that, as in Feinberg, there was no evidence before the trial court in this case that constituted evidence of bad faith or wrongful purpose and the trial court did not abuse its discretion in finding that there were no special circumstances to justify an award of attorney's fees.

C. THE "BALANCING OF THE BENEFITS" EXCEPTION

The second exception to the American Rule is the "balancing of the benefits" exception. This exception "occurs only 'if very unusual circumstances' can be shown." DCW Enterprises, Inc. v. Terre Du Lac Association, Inc., 953 S.W.2d 127, 132 (Mo. App. S.D. 1997). In affirming a denial of attorneys' fees, the court noted:

> [B]oth of these exceptions [special circumstances and balancing benefits] have been confined to very limited situations. Primarily,

> they have been found in cases involving trusts and estates. In such cases the beneficiary who has successfully brought litigation beneficial to the estate as a whole has been allowed to recover attorneys' fees from the state…. Another fact situation considered to be special or very unusual circumstances occurs when a litigant has successfully created, increased, or preserved a fund in which *non-litigants* were entitled to share. In such a case the court may order the *non-litigants* to contribute their proportionate part of counsel fees.

(Emphasis added). St. Peters is not asking non-litigants to pay its attorneys' fees in this case. It is asking a party to bear those expenses, and it is doing so before there is a final determination on the merits.

Jesser v. Mayfair Hotel, Inc., 360 S.W.2d 652, 661 (Mo. banc 1962) explains the "balancing of the benefits" exception.

> Where one goes into a court of equity and takes the risk of litigation on himself and successfully creates, protects, or preserves a fund or brings about the creation, increase, or protection of a fund in which others are entitled to share, those others will be required to contribute their proportionate part of counsel fees and expenses, and the equitable way to apportion these fees and expenses is to allow them against the fund.

D. THE "BALANCING THE BENEFITS" EXCEPTION DOES NOT APPLY IN THIS CASE

St. Peters further invokes the balancing the benefits exception to the American Rule. Claiming that the suit brought by Appellants/Cross-Respondents attacked the TIF Act as applied throughout over 145 redevelopment plans within 58 municipalities, St. Peters claims that it has benefited municipalities throughout the State and the City alone bore the attorney's fees for doing so.

While Appellants/Cross-Respondents strenuously oppose the City of St. Peters' claim that the suit brought by Appellants/Cross-Respondents attacked 145 redevelopment plans, nevertheless in so stating that St. Peters is a party, St. Peters admits that the trial court did not abuse its discretion in denying attorneys' fees under the "balancing of the benefits" exception. That exception only applies when persons who are not parties to the litigation receive a benefit from the litigation. The exception is thus a species of unjust enrichment.

> One exception to the rule, however, permits litigants to be "reimburse[d] when ordered by a court of equity [in order] to balance benefits." [Citation omitted.] This exception incorporates, at least, two related doctrines. First, it incorporates the common fund doctrine which was implicitly adopted when the Missouri Supreme Court permitted a trial court to require non-litigants to contribute their proportionate part of counsel fees when a litigant successfully created, increased, or preserved a fund in which the non-litigants

> were entitled to share. [Citations omitted] Second, it incorporates the Murray doctrine which this court utilized when it permitted recovery of attorney fees by a beneficiary of an estate who successfully brought litigation "beneficial to the estate as a whole rather than to just individuals interested therein." In re Estate of Chrisman, 723 S.W.2d 484, 487 (Mo.App.1986) (*quoting* Estate of Murray, 682 S.W.2d 857, 858-59 (Mo.App.1984)).

Feinberg, 922 S.W.2d at 26.

Respondent/Cross Appellant City of St. Peters claims that Appellants/Cross-Respondents' challenges were untimely and that Defendant City undertook financial obligations during that time and thus St. Peters was forced to defend the action brought by St. Charles County. St. Peters infers by its argument that it would not have defended if it did not have investment in the TIF Act. Further St. Peters claims that St. Charles County presented no justification for "their lengthy delay." St. Charles County established in its pleadings and submissions before the Court the reason for its sequence of actions.

If St. Peters believes it has created a benefit for these 58 municipalities, the "balancing of the benefit" exception required the trial court to award St. Peters its attorneys' fees and expenses from the coffers of those municipalities, not from the Appellants/Cross-Respondents. Nothing in Respondents/Cross-Appellants' argument in any manner establishes that the trial court abused its discretion in denying attorneys' fees under the balancing of the benefits exception to the

American Rule and the trial court's decision with regard to attorneys' fees should be affirmed.

Conclusion

The trial court did not abuse its discretion in overruling St. Peters' Motion for an Award of Attorneys' Fees. St. Peters' point should be denied.

CONCLUSION

For the reasons stated, the judgment of the trial court sustaining Respondents' Motions for Summary Judgment should be reversed and summary judgment entered in favor of Appellants. Rule 84.14. In addition, the judgment of the trial court denying Respondents/Appellants' St. Peters' request for attorneys' fees should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06(C)

Undersigned counsel hereby certifies that this brief complies with the requirements of Rule 84.06(b) in that it contains 17,565 words. Disks were prepared using Norton Anti-Virus and were scanned and certified as virus free.

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was sent via United States Mail, first-class postage prepaid on this 30th day of December, 2004, to:

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APPENDIX INDEX